NO. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, *et al.*,
Appellants,

v.

STATE OF MONTANA, *et. al.*,
Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AS AMICI CURIAE OF THE HONORABLE MAX BAUCUS, THE HONORABLE MARK N. ANDREWS, THE HONORABLE QUENTIN N. BURDICK, THE HONORABLE DENNIS DECONCINI, THE HONORABLE JOHN MELCHER, THE HONORABLE HANK BROWN, THE HONORABLE BYRON L. DORGAN, THE HONORABLE RAY KOGOVSEK, THE HONORABLE MICHAEL E. LOWRY, THE HONORABLE RON MARLENEE, THE HONORABLE JIM SANTINI, THE HONORABLE ALLEN BYRON SWIFT, THE HONORABLE PAT WILLIAMS, THE HONORABLE TIMOTHY E. WIRTH IN SUPPORT OF APPELLEES.

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BRIEF AS AMICI CURIAE OF SEVERAL MEMBERS OF CONGRESS IN SUPPORT OF APPELLEES

This brief amici curiae is filed with the written consent of counsel for the parties by several Members of Congress:

INTEREST OF THE AMICI CURIAE

The amici believe that the outcome of this case challenging the power of a State to impose severance taxes on natural resources within its borders could have a substantial impact on the ability of the States to raise taxes to provide for the general welfare of the citizens of those States. Amici are concerned that a decision in favor of

the appellants would set a dangerous precedent for use of the national Commerce Clause power to interfere in the areas of traditional State governmental functions. This brief also serves to inform the Court that Congress is not united in its approach to the issues involved in this case.

SUMMARY OF ARGUMENT

The rate of taxation imposed on an intrastate or local activity, such as the mining of coal, is normally a matter for the State legislature to consider. State sovereignty requires that the states have considerable autonomy in determining which intrastate activities are subject to taxation and at what rates. The factors which go into such a determination are political factors which are appropriately considered by the state legislature, not the federal courts. If the federal courts were to attempt to determine whether the Montana severance tax on strip mined coal is appropriate or fair, not only would they have to make such a determination without any guidelines other than political ones, but also they would be faced with the very real possibility that every state tax would be subject to the same standardless review by the federal courts. Such a result is always to be avoided, and particularly in this case because not only does the Montana tax have a minimal impact on interstate commerce, but also the right to tax has been recognized by Congress.

ARGUMENT

I. The State legislature is the appropriate governmental body to determine whether a tax on an intrastate or local activity should be imposed, and at what rate.

Appellants do not challenge the right of Montana to tax the severance of coal by strip mining; they challenge only the rate of taxation. Appellants ask this Court to make a uniquely political judgment: what is an appropriate

or fair rate of taxation to be imposed on the severance of coal by strip mining. If this Court were to hold that a 30% tax on the severance of coal by means of strip mining is too high, and the Montana legislature were to enact another tax at a rate of 25% or 20% or 15%, this Court would then have to determine the fairness of those rates. These are not judicial issues; they are political questions for the state legislature. If the federal courts usurped this power, the burden on the courts to make such determinations would prove to be extraordinary, for in modern times virtually every state tax "affects" interstate commerce.

A. The decisions of this Court reflect sound policy reasons for upholding the constitutionality of state severance taxes regardless of the rates.

This Court has never held that a state severance tax burdened interstate commerce even when a large percentage of the severed resources subsequently entered interstate commerce. *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1932); and *Hope Gas Co. v. Hall*, 274 U.S. 284 (1927), answer most of the arguments raised by appellants. *Heisler* involved a severance tax on anthracite coal. It was alleged that Pennsylvania had a natural monopoly on anthracite coal in the United States; that coal was a prime necessity for life, especially in the northeastern states; that 80 percent of the coal was shipped outside of Pennsylvania; and that Pennsylvania would be able to force consumers in other states to pay the tax. The Court turned aside the challenge to the tax because the incidence of the tax was prior to the entry of the coal into interstate commerce. A contrary decision would have left the states with nothing to regulate or to tax. *See* 260 U.S. at 259-260.

No subsequent decisions of this Court have imposed limits on the ability of states to tax local activities or articles

merely because the activities "affect" or the articles eventually enter interstate commerce. Indeed, recent Commerce Clause cases have made clear that a state may tax various aspects even of interstate commerce. *See, e.g., Complete Auto Transit v. Brady,* 430 U.S. 274 (1977); *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976); *Department of Revenue v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978).

The policy of leaving to the state legislature the decision whether to tax intrastate activities and the rate of such taxation remains a sound one. One of the essential attributes of state sovereignty is the power to raise funds by taxation; this power is essential to the very existence of a state. Almost every local activity has some effect on interstate commerce. If the federal judiciary should bar a tax on a local activity, before it enters the stream of commerce, because it "affects" interstate commerce, then the state's power to tax would be a virtual nullity. Every state tax would be subject to challenge in the federal courts, and the federal courts would become a super-state legislature.

B. The standards for determination of what taxes should be imposed on local activities are political questions for the state legislature and are beyond the institutional competence of the federal judiciary.

When a legislature, whether the Congress of the United States or a state legislature, imposes a tax and determines the rate of that tax, the factors that it considers are political factors. A state legislature decides what tax is fair based on the entire complex of state taxes, upon the ability of the taxpayer to pay, upon a determination as to whether the tax is progressive or regressive, upon how much money the tax will raise, upon constituent interests, upon the impact of the tax on the business community in the state, upon a value judgment as to what activities it wishes to

encourage or discourage by taxation, upon an economic judgment as to whether the effect of the tax will be productive, and upon a host of other political issues.

These determinations are made after informal private consultations and legislative hearings in which witnesses may offer facts, statistics, and opinions as to what the effect of a proposed tax will be. Gradually an imprecise consensus is formed, and a political decision is reached about whether or not the tax should be imposed and the appropriate level of the tax. This is a decision uniquely appropriate to the state legislative process and one for which the federal judiciary is not competent because it is not responsive politically and cannot consider under evidentiary rules all the factors that a state legislature can. Only in the most extraordinary situation, such as a tax imposed on citizens because of their race, in which there is clear Constitutional violation, should the federal judiciary concern itself with a state tax imposed on intrastate activities.

Since almost every type of severance tax which a state can levy can affect some aspect of interstate commerce, every kind of state severance tax could be subjected to a complicated factual analysis as to its impact. Numerous states have severance taxes on a wide variety of resources. Some of those states collect revenues which far exceed the total amount obtained under the Montana coal severance tax. For example, in 1977 the State of Texas collected over $900 million in severance tax revenues—over 20 times the revenues generated by the Montana coal tax that year.[1]

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[1] See testimony of Senator Dave Durenberger, Hearing Before the Committee on Energy and Natural Resources, United States Senate, 96th Cong., 2d Sess., August 6, 1980, Table 7, pp. 77-78.

Beyond that, other states rely far more heavily on royalties and severance taxes than does Montana.

1977

Royalties and Severance Taxes as a Percentage of State Government Revenues

Rank	State	Percent
1.	Louisiana	19.43
2.	New Mexico	15.78
3.	Texas	13.85
4.	Wyoming	11.42
5.	Oklahoma	9.18
6.	Montana	6.82
7.	Alaska	4.46
8.	Kentucky	3.79 [2]

These taxes are on some occasions applied as a percentage of the gross value of the resource, a flat amount per barrel or thousand cubic feet, a percentage of the sales price, and so on. The taxes are, in short, difficult to compare and are the subject of considerable political judgment.

Other types of taxes are equally complicated and could be subject to challenge. States with high levels of tourism and with relatively high hotel, restaurant, entertainment, or gambling taxes arguably force nonresidents to contribute more to state revenues than the benefits which they receive. Examination of inheritance taxes on local real estate or nonresidents might indicate that a state is asking more of these taxpayers than it asks of others. Income, gross receipts, and sales taxes might be subject to challenges based on the Commerce Clause. Who is to say when a tax that goes to support the general revenues of the state is out of all proportion

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[2] *Id.*, Table 8, p. 79.

to the benefits provided? What standard measures the benefits a taxpayer receives from a state?

Opening state tax rates and benefits received by taxpayers to judicial examination would also open the mix of state taxes to examination. If a state should decide to levy high property taxes and to forego a state income tax or vice versa, one group of taxpayers may be subjected to higher taxes than if both taxes were levied at lower rates. States with high cigarette or alcohol taxes may be imposing heavy taxes on certain consumers who gain no special benefit from the state other than the usual benefits of civilized society and local government.

A challenge to a single tax based on the aggregate revenues resulting from that tax would bring the entire state tax structure before the court. A tax which may seem unreasonable standing alone may be reasonable when the mosaic of all state tax considerations is examined. As this Court stated in *Carmichael v. Southern Coal and Coke Co.*:

> [A]s the state is free to distribute the burden of a tax without regard to the particular purpose for which it is to be used, there is no warrant in the Constitution for setting the tax aside because a court thinks that it could have drawn a better statute or could have distributed the burden more wisely. Those are functions reserved for the legislature. 301 U.S. 495, 525 (1937).

This Court has been a strong defender of the prerogative of a state to determine how to structure its taxes, *e.g., Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), what to include in the tax base, *e.g., Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 455 U.S. 425 (1980), and what accounting method to require, *e.g., Exxon Corp. v. Department of Revenue of Wisconsin*, 466 U.S. ——, 100 S.Ct. 2109 (1980).

Similar deference should be accorded a state's right to

select an appropriate tax rate for a severance tax. Judicial second-guessing of legislative tax decisions would open the courts to every disgruntled taxpayer who feels that a tax imposes an extraordinary burden on himself, and can demonstrate that the tax affects interstate commerce.

C. The effect of the Montana severance tax on coal is not adverse to the national interest and does not warrant the intervention of the federal judiciary.

The factual question which appellants seek to have resolved in the courts—whether the economic impact of the Montana tax is so unfair that it unduly burdens interstate businesses and requires these businesses to pay taxes which are disproportionate to the benefits received—illustrates the complexity of the factual issues which appellants would subject to judicial redetermination. Appellants assert that the 1975 tax is a 30% tax on the value of coal which on a percentage basis, increases by 500% to 1,250% the severance tax today compared to the severance tax that was in effect prior to 1975. (Brief for Appellants at 7-8). This analysis, suggesting astronomical increases in the ultimate price of coal, is faulty for two reasons. First, the tax rate differs depending upon how the coal is mined. The 30% tax is imposed only on strip mined coal, which constitutes the majority but not all of Montana coal. Second, as the following figures demonstrate, the amount of the tax when compared to the ultimate price of coal to the consumer, is far less than appellants imply. The tax is imposed as a percentage of the contract sales price before shipping, and the shipping costs constitute the largest share (typically 60%) of the cost to consumers.[8] Moreover, even with the

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[8] See testimony of Mr. William Christiansen, Hearings Before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, 96th Cong., 2d Sess., March 21, 1980, Ex. XI, p. 81.

tax, the price of Montana coal is still considerably lower than the price of coal mined in most other states. Recent estimates show Montana coal selling at $8.50 per ton with Eastern and Midwestern coal selling at over $20 per ton.[4]

Furthermore, a more accurate measure of the impact of an energy resource tax is the tax per BTU of heat produced. Coal, oil, and gas have value by virtue of their heating capability. By this measure, Montana's coal tax produces 9.97 cents revenue per million BTU's. This compares very favorably with other state severance taxes—taxes which appear on their face to be lower than the Montana tax. For example, Louisiana's 12.5% tax on oil is in fact a tax of 16.58 cents per million BTU's—over 60% higher than Montana's coal tax.[5]

We cite these figures not to support an argument on the merits that the Montana tax is reasonable. Rather, we wish to illustrate the complexities of the issue put forth by appellant as to the fairness of the tax and its effect on the ultimate taxpayer and on interstate commerce.

Additionally, there are obvious market restraints which prevent Montana from imposing a tax so high that it would make Montana coal unable to compete with coal mined in other states with alternative sources of energy. Montana has no monopoly on coal, and coal is not the only source of energy. If the tax were so high that it caused the mining of coal in Montana to decline significantly thereby decreasing employment and revenues, there would be sub-

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[4] See testimony of Hon. Ed Herschler, Governor, State of Wyoming, Hearing Before the Committee on Energy and Natural Resources, United States Senate, 96th Cong., 2d Sess., August 6, 1980, p. 229.

[5] See testimony of Senator John Melcher, Hearing Before the Committee on Energy and Natural Resources, United States Senate, 96th Cong., 2d Sess., August 6, 1980, Attachment 5, p. 138.

stantial incentive for the Montana legislature to lower the tax.

Finally, there are legitimate reasons why Montana could choose to impose a heavier tax on strip mined coal than it imposes on other business activities and to set aside part of the proceeds of that tax in a trust fund for future generations. Strip mining may have severe adverse effects on the environment. The Montana State Legislature clearly recognized the severity of these impacts in adopting the coal severance tax (15-35-101 *et seq.*, MCA.) and the Montana Strip and Underground Mine Reclamation Act (82-4-201 *et seq.*, MCA). These environmental costs will be borne not only by the current generation of Montana citizens, who will share in the economic advantages and disadvantages that flow from an active coal industry, but also by future generations long after the economic advantages have diminished or ceased. Coal is a limited resource which, if mined today, will be unavailable to future generations. It is surely within the power of the Montana legislature to tax the depletion of this resource and to set aside a portion of the tax for future generations.

II. Congress has recognized the right of the states to impose severance taxes on coal and has not preempted such taxes.

The Commerce Clause grants the power to regulate interstate commerce to the Congress, not to the courts, and when Congress has acted, the role of the courts should be to enforce Congress' action. *See Pennslyvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 (How.) 421, 430 (1856)); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). Congress expressly recognized the validity of state severance taxes in the Mineral Lands Leasing Act of 1920. 30 U.S.C. § 189 states:

> [N]othing in this Act shall be construed or held to affect the rights of the States or other local authority to

> exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mine, or other rights, property, or assets of any lessee of the United States.

This Court interpreted this language to mean that Congress authorized the states to impose severance taxes upon lessees of Federal lands without regard to the interest of the United States in the lands or leases. *Mid-Northern Oil Co v. Walker,* 268 U.S. 45 (1925). While *Mid-Northern Oil* dealt only with the propriety of state severance taxes on lessees of federal lands, it follows that such taxes on non-federal lands are also proper or else the 1920 Act would authorize a state tax that discriminates against federal lessees.

In enacting the Power Plant and Industrial Fuel Use Act in 1978, three years after the challenged Montana severance tax went into effect, Congress acknowledged that states have severance taxes on coal and other fuels and provided that such severance taxes should be taken into account when determining a state's need for certain impact assistance. *See* 42 U.S.C. § 8401(a)(2). This statute is an express congressional recognition of severance taxes and reflects a congressional determination that these taxes are compatible with the Commerce Clause.

Despite the clear authorization by statute since 1920 for the imposition of severance taxes, appellants urge that the rate of the Montana tax violates the legislative intent of the Mineral Leasing Act, because a broad federal policy in favor of the use of coal underlies other statutes that have no direct relevance to several taxes. In short, appellants urge this Court to ignore the clear language of the statute and interpret the statute by considering the legislative intent of other statutes. This approach turns on their head well-accepted principles of statutory construction. Moreover, even apart from the dispositive effect of the Congressional

authorization to impose severance taxes, the statutes and "policies" cited by appellants offer no basis for concluding that Congress has preempted the Montana severance tax. Indeed, Congressional *amici* supporting appellants make no preemption argument whatsoever in their brief.

Unless there is clear federal preemption—a direct conflict or congressional intent to override contrary state legislation—the judiciary is generally without power to interfere on Commerce Clause grounds with state taxation. In this case, there is no direct conflict between state and federal legislation. The conflict asserted is between federal energy policies promoting the use of coal and the rate of Montana's severance tax on strip mined coal. Without direct conflict, congressional intent to override the state legislation must be found. This intent may be shown in a number of ways, including the pervasiveness of federal regulation, the dominance of the federal interest because of a need for national uniformity, or the danger of conflict between federal and state legislation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-231 (1947); *Pennsylvania v. Nelson*, 350 U.S. 497, 502-505 (1956). However, "the exercise of federal supremacy is not lightly to be presumed." *New York State Dept. of Social Service v. Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952); *see Sears, Roebuck & Co. v. San Diego County District Council*, 436 U.S. 180 (1978); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). The rule in *Rice v. Santa Fe Elevator Corp.* "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted).

Two factors beyond the express congressional authoriza-

tion of severance taxes make appellants' preemption argument a particularly weak one.

First, although Congress has considered adopting legislation which would limit the rate of state coal severance taxes, *e.g.*, H.R. 6625, H.R. 6654, H.R. 7163, and S. 2695 introduced in the 96th Congress, Congress has been sharply divided over the advisability of such legislation and has not adopted such a limitation. Neither the opponents nor the proponents of these bills argue that existing legislation or policies preempt Montana's severance tax rates. If the advisability of such legislation is hotly contested within the Congress, it cannot be said that there is a clear federal policy in favor of preemption until Congress adopts legislation specifically supporting such limitation.

Second, *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), instructs that a conflict between a general federal policy and a state statute, without a more specific expression of intent to affect a particular type of state statute, is insufficient to preempt the state statute.

> Appellants point out that the Robinson-Patman Act itself may be characterized as an exception to, or a qualification of, the more basic national policy favoring free competition, and argue that the Maryland statute "undermine[s]" the competitive balance that Congress struck between the Robinson-Patman and Sherman Acts. This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute . . . We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to preempt the power of the Maryland Legislature to enact this law. 437 U.S. at 133 (citations and footnotes omitted).

Refusal to find preemption of state legislation on the basis of general federal policies arguably reflected in a few federal statutes is additional insurance that the preemption does not occur "unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co., supra,* 430 U.S. at 525. Because of the lack of congressional agreement on whether state severance tax rates should be limited, and because it cannot be said that the Montana severance tax on coal stands as an obstacle to accomplishment of the objectives of Congress, *De Canas v. Bica,* 424 U.S. 351 (1976), or that it frustrates the full effectiveness of a federal law, *Perez v. Campbell,* 402 U.S. 637, 652 (1971), no federal legislation nor even a "federal policy" preempts the Montana coal severance tax.

III. The Standards Set Forth in Complete Auto Transit v. Brady Are inapposite Here, But Montana's Coal Severance Tax Would Survive Scrutiny Under Those Standards.

This case is unique in that it raises the question not of whether the state may tax a particular activity, but at what rate the state may tax. There is no case law that even suggests standards for the federal courts to use in evaluating the rate of a state tax.

Appellants have urged this Court to apply the fourpart test set out in *Complete Auto Transit v. Brady,* 430 U.S. 274, 278 (1977). Even a cursory glance at the *Complete Auto* test demonstrates that it is a test to measure whether a state may tax an instrumentality of interstate commerce, not a test to measure the rate at which a state may tax a local activity which affects interstate commerce. The cases in which the test has been applied are all cases in which an instrumentality of interstate commerce has been taxed. *See Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978) (tax on unloading of items that have moved in interstate commerce); *Complete Auto Tran-*

sit, Inc. v. Brady, supra (tax on transportation of automobiles in interstate commerce); *cf. Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979) (tax on a shipping container). Indeed the first two parts of the four-part test—substantial nexus to the taxing state and fair apportionment—are obviously irrelevant to a tax on a local activity which occurs entirely within one state and could not be taxed by another state.[6]

Forcing the *Complete Auto Transit* test into a role for which it was not designed, appellants argue that the Montana tax is inconsistent with the final two parts of the test, which prohibit discrimination against interstate commerce and which require that a tax on interstate commerce be fairly related to benefits received by the taxpayer. The argument is not persuasive.

A. The Montana severance tax does not discriminate against interstate commerce because it does not favor local markets over interstate markets.

Appellants argue that the tax discriminates against interstate commerce "because it would shift an extraordinary burden to other states". (Appellants' Brief at 33.) The cases cited do not support such an argument. Appellants concede that the Montana tax does not discriminate on its face, while citing *Nippert v. City of Richmond,* 327 U.S. 416 (1946), for the proposition that a tax which is not discriminatory on its face may discriminate in fact. In order to find discrimination, whether facial or factual, there must be a discrimination against interstate goods or taxpayers in favor of local goods or taxpayers or an attempt

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[6] It is ironic that appellants rely on these cases which, although largely irrelevant to a tax on a local activity, do generally represent a trend of expanding the power of the states to tax actual interstate commerce, since appellants seek to diminish the power of the states to tax local activities which merely affect interstate commerce.

to benefit local commerce at the expense of interstate commerce. The first type of discrimination occurs in situations such as *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318 (1977), where higher tax rates were imposed on out-of-state businesses than on local businesses, or *Nippert v. City of Richmond, supra,* where the facially neutral tax was found to impose a higher tax on out-of-state vendors than on local vendors. The second category of cases is illustrated by *Pike v. Bruce Church,* 397 U.S. 137 (1970), where an Arizona statute prohibited shipment of canteloupes out-of-state unless they had been packed in a state-approved manner, or *Oklahoma v. Kansas Gas Co.,* 221 U.S. 229 (1911), where the state tried to prohibit the exportation of natural gas. In these last two situations the statute was designed to favor local industry at the expense of interstate commerce.

In this case there is no attempt to favor local industry over out-of-state industry nor is there an attempt to prevent local resources from being exported. This case involves a uniform tax on every ton of coal produced in Montana, whether produced by local or out-of-state taxpayers and whether bound for use in or out of Montana. Even if appellants could prove that every ton of coal produced in Montana were eventually exported, that alone would not prove discrimination. Appellants' argument resembles that rejected by the Court in *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978). In that case, *Exxon* challenged a Maryland statute which prohibited producers and refiners of gasoline from operating retail service stations in the state. The effect of the act was to require producers and refiners to divest themselves of any retail outlets which they owned. The divestiture requirements affected only interstate companies, but this Court said that "this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level." *Id.* at 125.

The Court listed some of the factors which led to its conclusion that the Maryland statute did not discriminate against interstate commerce:

> In fact, the Act creates no barrier whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce . . . The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce. *Id.* at 126. (Citations and footnote omitted.)

Similarly, the Montana statute does not prohibit the flow of interstate goods, does not place added costs on interstate goods as such, and does not distinguish between in-state and out-of-state companies. In short, the tax does not discriminate against interstate commerce.

B. The Montana statute does not burden interstate commerce because Montana has provided services and benefits for which it is entitled to compensation.

Appellants allege that the Montana tax is not fairly related to the services provided by the state and seek an opportunity to prove that the tax bears no relationship to the legitimate needs of Montana. Appellants Brief at 29-30. Although this Court has not decided a case where the "fair relationship" test has been put in issue, more than once this Court has indicated that the fair relationship test would be satisfied by provision of services including "police and fire protection" and "the benefits of a trained workforce and the advantages of a civilized society." *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 445 (1979); *Department of Revenue v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 764 (1978) (concurring

opinion); *Exxon Corp. v. Department of Revenue of Wisconsin*, 446 U.S. ____, 100 S.Ct. 2109, 2122 (1980).

There is no basis for a court to consider other factors. Indeed, appellants have failed completely to suggest how a court could identify, much less quantify, the benefits received by coal companies operating in Montana from the activities of the state's government. Moreover, except in the case of user fees, "a tax is not an assessment of bene fits . . . The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937). In this case there is no allegation that the taxes are not devoted to public purposes. Creation of a trust fund for future generations is a legitimate public purpose. Providing funds to ameliorate the local impact of strip mining, providing funds for education, providing funds for highway improvement, and using taxes for the general support of the government are also legitimate public purposes. *See* 15-35-108 MCA. Federal courts have no basis for substituting their judgments on these matters for those of the Montana legislature.

CONCLUSION

For the foregoing reasons and those set forth by the appellees, the judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted,

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